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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74- 74-731

RAYMOND C. BROWN, Chairman,
California Adult Authority,
Petitioner,

v.

LAWRENCE L. LA CROIX,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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IN THE

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OCTOBER TERM, 1974

No. 74-

RAYMOND C. BROWN, Chairman,
California Adult Authority,
Petitioner,

v.

LAWRENCE L. LA CROIX,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of California

The petitioner, Raymond C. Brown, Chairman of the California Adult Authority, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the California Supreme Court entered in this habeas corpus action on July 25, 1974.

OPINIONS BELOW

The opinion of the California Supreme Court appears in Appendix A to this petition. It is reported as *In re La Croix* (1974) 12 Cal.3d 146, 115 Cal.Rptr. 344, 524 P.2d 816. The opinion in this case issued after the California Supreme Court had granted petitioner's request for a hearing of the opinion issued by the Court of Appeal for the State of California, Third

Appellate District, on May 9, 1973. That opinion and its modification appears in Appendix B to this petition. The decision of the Court of Appeal of the State of California, Third Appellate District, was issued following its granting a rehearing upon petitioner's request from that court's original opinion, appearing herein as Appendix C, granting respondent's petition for writ of habeas corpus.

JURISDICTION

The judgment of the California Supreme Court was entered on July 25, 1974. Petitioner's request for a rehearing before that court was denied on September 12, 1974. This petition for a writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Does due process require that a parolee who has been convicted of a new crime while on parole be afforded an in-community pre-revocation of parole hearing as well as an in-prison parole revocation hearing, or may the parole authorities return such person to prison and conduct only the latter hearing?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment XIV, Section 1, in relevant part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citi-

zens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws."
(Emphasis added.)

STATUTORY PROVISIONS INVOLVED

California Vehicle Code section 23102(a):

"(a) It is unlawful for any person who is under the influence of intoxicating liquor, or under the combined influence of intoxicating liquor and any drug, to drive a vehicle upon any highway."

* * * * *

California Penal Code section 3056:

"Prisoners on parole shall remain under the legal custody of the department and shall be subject at any time to be taken back within the inclosure of the prison."

* * * * *

California Penal Code section 476a:

"(a) Any person who for himself or as the agent or representative of another or as an officer of a corporation, willfully, with intent to defraud, makes or draws or utters or delivers any check, or draft or order upon any bank or depositary, or person, or firm, or corporation, for the payment of money, knowing at the time of such making, drawing, uttering or delivering that the maker or drawer or the corporation has not sufficient funds in, or credit with said bank or depositary, or person, or firm, or corporation, for the payment of

such check, draft or order and all other checks, drafts or orders upon such funds then outstanding, in full upon its presentation, although no express representation is made with reference thereto, is punishable by imprisonment in the county jail for not more than one year, or in the state prison for not more than 14 years.

"(b) However, if the total amount of all such checks, drafts, or orders that the defendant is charged with and convicted of making, drawing, or uttering does not exceed one hundred dollars ($100), the offense is punishable only by imprisonment in the county jail for not more than one year, except that this subdivision shall not be applicable if the defendant has previously been convicted of a violation of Section 470, 475, or 476 of this code, or of this section of this code, or of the crime of petty theft in a case in which defendant's offense was a violation also of Section 470, 475, or 476 of this code or of this section or if the defendant has previously been convicted of any offense under the laws of any other state or of the United States which, if committed in this State, would have been punishable as a violation of Section 470, 475 or 476 of this code or of this section of this code or if he has been so convicted of the crime of petty theft in a case in which, if defendant's offense had been committed in this State, it would have been a violation also of Section 470, 475, or 476 of this code, or of this section.

"(c) Where such check, draft, or order is protested, on the ground of insufficiency of funds or credit, the notice of protest thereof shall be admissible as proof of presentation, nonpayment and

protest and shall be presumptive evidence of knowledge of insufficiency of funds or credit with such bank or depositary, or person, or firm, or corporation.

"(d) The word 'credit' as used herein shall be construed to mean an arrangement or understanding with the bank or depositary or person or firm or corporation for the payment of such check, draft or order.

"(e) If any of the preceding paragraphs, or parts thereof, shall be found unconstitutional or invalid, the remainder of this section shall not thereby be invalidated, but shall remain in full force and effect."

* * * * *

STATEMENT OF THE CASE

Petitioner seeks a writ of certiorari to have this Court review the decision of the California Supreme Court which held, *inter alia,* that parolees convicted of a new crime while on parole may be entitled to an in-community pre-revocation of parole hearing. Said decision was based upon the California Supreme Court's interpretation of this Court's decision in *Morrissey* v. *Brewer* (1972) 408 U.S. 471.

The Court of Appeal of the State of California, Third Appellate District, initially issued an Order to Show Cause in this matter on December 15, 1972. The order was directed to W. G. Black, Superintendent of the California Conservation Center, the institution at which respondent was confined at that time. That Court filed an opinion in the matter on March 1, 1973.

Petitioner's request for rehearing before that court was granted on March 28, 1973, and thereafter, on May 9, 1973, the court issued its opinion granting the writ of habeas corpus. Petitioner's second petition for rehearing was denied and the opinion modified on June 6, 1973.

On July 6, 1973, petitioner's request for a hearing was granted by the California Supreme Court and the opinion in the matter was rendered on July 25, 1974. Petitioner's request for a rehearing before that court was denied on September 12, 1974.

FACTUAL STATEMENT

Respondent was convicted in 1971 of the felony of issuing a check without sufficient funds in the bank to cover the same and was sentenced to the state prison for the term prescribed by law. Thereafter, his term was fixed by the Adult Authority at four years. In May 1972 he was released on parole in San Bernardino County. It appears from parole officers' reports that on July 7, 1972, respondent issued to an automobile dealer a check in the sum of $4,308 which when presented for payment was returned to the dealer because of insufficient funds. At approximately the same time respondent vacated his apartment without giving a required notification to his parole officer. On July 8 respondent was involved in an accident when his vehicle struck another vehicle which was stopped at a traffic control light. He was arrested on a misdemeanor charge of driving while under the in-

fluence of an intoxicating liquor, commonly referred to as drunk driving (California Veh. Code, § 23102, subd. (a)) and a breath analyzer test revealed a .25 percent blood alcohol content.

Respondent failed to appear in court in answer to the foregoing charge and a bench warrant was issued for his arrest. He was arrested as a parole violator (California Pen. Code, § 3056) on July 31 in Inyo County when he attempted to cash a check. On September 14 respondent entered a plea of guilty to the drunk driving charge and thereafter served 30 days in the county jail.

Prior to respondent's return to custody the Authority had ordered on July 28 that respondent's parole be suspended and that he be returned to prison "pending further determination" of parole violations. On September 26, while respondent was still confined on the drunk driving conviction, specifications of parole violations were prepared. These included the leaving of the San Bernardino area without notification to his parole officer, writing a check without sufficient funds in the bank to cover the same (California Pen. Code § 476a) and operating a vehicle while under the influence of intoxicating liquor in violation of California Vehicle Code section 23102, subdivision (a), "as evidenced by his conviction" therefor. On October 20 the Authority again ordered that parole be suspended and that respondent be returned to prison "for revocation proceedings."

On October 24, while still in the San Bernardino County jail although the term of confinement for the drunk driving conviction had expired, respondent was given a copy of the charges of parole violation and a notice which advised him that he was entitled to a pre-revocation hearing. On that same day petitioner made a written request for such a hearing. Respondent was transferred to prison on November 2, however, without the holding of a pre-revocation hearing.

After the order to show cause was issued herein an in-prison parole revocation hearing was held on February 9, 1973. Respondent pleaded not guilty to all charges of parole violation, but was found guilty as charged on all counts, and parole was formally revoked.

REASON WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

A Parolee Convicted of a New Crime While on Parole Is Not Entitled to an In-Community Pre-Revocation of Parole Hearing

Initially, it should be noted that while respondent's petition for writ of habeas corpus was denied by the California Supreme Court because he was deemed to have consented to any delay in providing him an in-community pre-revocation of parole hearing, the issues necessary to the decision, concerning the right of a parolee to such hearing, were decided adverse to petitioner. In such a situation it is proper for the aggrieved party to seek review by this Court on those

issues. See *Partmar Corporation* v. *Paramount Corporation* (1954) 347 U.S. 89. See also *Richardson* v. *Ramirez, et al.* (June 24, 1974) ____ U.S ____, 42 U.S.L.W. 5016.

In *Morrissey* v. *Brewer, supra*, 408 U.S. 471, this Court set forth the minimum due process standards which govern the revocation of parole by state authorities. The two Iowa parolees in that case were charged with violations of parole that did not amount to new criminal offenses. Hence, this Court did not have occasion to pass upon the due process procedures mandated when the parolee is charged with a new crime that also constitutes a prima facie violation of parole. Unlike the parolees in *Morrissey, supra*, the parolee charged with a new crime is entitled to a jury trial on the new criminal charge in all California felony and misdemeanor cases. Petitioner submits that once such parolee has been found guilty of the new charge beyond a reasonable doubt, there is no need for an in-community hearing for purposes of parole revocation in order to determine whether there is probable cause to believe that the parolee committed the crime.

In its opinion in the instant case, the California Supreme Court held that a preliminary hearing on a criminal charge may be an adequate substitute for the in-community pre-revocation of parole hearing where the parolee is given notice of the dual purpose of such proceeding. Because of inherent time delays and the lack of an adequate record, the court also held

that misdemeanor proceedings resulting in a conviction are less apt to be such a substitute.

In *Morrissey*, this Court held that an informal hearing be required before revocation of parole, structured to assure that the finding of parole violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee's behavior. 408 U.S. at 484. The sole purpose of this informal hearing is "to determine whether there is probable cause or reasonable ground to believe that the arrested parolee has committed acts that could constitute a violation of parole conditions." 408 U.S. at 485. This Court noted in so concluding that the first stage of the parole revocation procedure usually begins with the arrest of the parolee at the direction of his parole officer.

Where a parolee has been charged with or, as in the instant case, convicted of a new crime, that determination is not one that is made by the parole agent. Rather, the decision resulting in the new charges is made by an independent third person such as the district attorney, grand jury, magistrate after a preliminary examination or judge and/or jury after trial. In each of these instances it is not the determination of the parole agent that a crime has been committed but that of an established legal process during the course of which the parolee's rights have been fully safeguarded.

If the purpose of the pre-revocation hearing is to determine probable cause that a condition of parole

has been violated, then the conviction of a new crime, after which the issue has been determined beyond a reasonable doubt, should be sufficient to satisfy the finding of probable cause. Where such conviction is based upon a plea of guilty, the basis of the parole violation charge had been admitted to by the parolee. The fact that a parolee signs a list of his conditions of parole which always includes the condition to obey all laws of the State, other states and the United States, should be sufficient to put a parolee on notice of the collateral consequences of a conviction of a new crime after trial or plea of guilty.

Indeed, when dealing with the right to a revocation hearing of inmates against whom detainers had been placed for parole violation, the United States District Court for the District of Columbia in *Fitzgerald* v. *Sigler* (D.D.C. 1974) 372 F.Supp. 889, 898, held:

> "The respondents would distinguish the instant case from *Morrissey* by limiting the latter solely to its own facts, which did not deal with a parolee in custody by reason of a criminal conviction. However, that the Court was mindful of such a parolee is indicated by a remark made in the course of delineating the limits of the due process hearing: 'Obviously a parolee cannot relitigate issues determined against him in other forums, as in the situation presented when the revocation is based on conviction of another crime.' 408 U.S. at 490, 92 S.Ct. at 2605. To this Court the plain import of that language is that the mandate of a prompt, final revocation hearing is not obviated, but only that the content of such a hearing might be altered,

by the fact of a conviction while on parole. For instance, the first-stage preliminary hearing required by *Morrissey* would surely be met by the fact of the intervening conviction and sentence. But according to *Morrissey,* there would have to be a second-stage final hearing in all cases and within a reasonable time to satisfy due process.

"In view of the above, then, it seems clear that the Board no longer has any discretion as to whether to grant a prompt parole revocation hearing. Such discretion as is lodged in the Board is related to what disposition to make in each case after and as a result of the hearing. But there must be a final hearing."

In the course of the parole revocation process a number of situations may exist. The parole revocation may be based upon "conduct" charges only, not the subject of a criminal prosecution. In such a case, as in *Morrissey,* due process requires both hearings. Where revocation is based upon the conviction of a new crime only the in-prison hearing appears necessary since the probable cause determination has already been established by virtue of the conviction. Where parole revocation is based upon both conduct violations and a new conviction, the same rule should apply, since a finding of probable cause as to any one alleged violation is sufficient cause to withdraw the parolee's conditional liberty and result in a return to prison for a full hearing on all charges.

If a parolee were entitled to a separate community hearing on charges other than the subject of a criminal prosecution, a situation of hardship could be cre-

ated. He might be forced to claim his Fifth Amendment privilege if the conduct charges relate in any way to the pending criminal charge. *Silver* v. *McCamey* (D.C. Cir. 1955) 221 F.2d 873, 875; cf. *United States ex rel. Carioscia* v. *Meisner* (N.D. Ill. 1971) 331 F.Supp. 635; but see *Flint* v. *Mullen* (D. R.I. 1973) 372 F.Supp. 213, 221.

Procedural due process is not a scientifically exact concept to be applied rigidly and uniformly to a wide range of disparate situations. Rather the concept is flexible and is translated into specific safeguards only after evaluating the nature of the governmental function involved and the private interest to be affected by governmental action. *United States ex rel. Martinez* v. *Alldredge* (3rd Cir. 1972) 468 F.2d 684, 687. Parole authorities should at least have the discretion as to whether to hold a hearing during the pendency of criminal prosecution.

The safeguards provided by an in-community prerevocation of parole hearing would appear to be minimal in the situation where the parolee had already received the full panolply of rights inherent in a criminal trial. The administrative burden to the California Adult Authority, on the other hand, in providing such hearings would be great considering the fact that a substantial proportion of parolees returned to prison for parole violations are parolees who have committed new crimes.

While *Morrissey* did not involve a situation involving parolees who had been convicted of a new crime, this Court was alert to that problem and indicated:

> "Obviously a parolee cannot relitigate issues determined against him in other forums, as in the situation presented when the revocation is based on conviction of another crime." 408 U.S. at 490.

Thus, the pre-revocation hearing is not required by due process in every case, but can be done away with when the reason for it is obviated. If there exists a final in-prison revocation hearing which results in findings sufficient to sustain revocation, the absence of an in-community hearing should not vitiate that determination. *Richardson* v. *New York State Board of Parole* (1973) 341 N.Y.S.2d 825, 827. A parolee has already had his hearing on the issue of probable cause in accordance with due process where revocation is based upon a judicial determination that he is guilty of a new crime. Cf. *Purifoy* v. *State Board of Education* (1973) 30 Cal.App.3d 187, 106 Cal.Rptr. 201.

Thus, due process requires both pre-revocation and revocation hearings only in the case where conduct violations of parole are charged. Where revocation is based upon the parolee's conviction of a new crime, only the in-prison revocation hearing should be required.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

SUPREME COURT
FILED
July 25, 1974
G. E. BISHEL, *Clerk*

Deputy

COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

In re LAWRENCE L. LA CROIX on Habeas Corpus. } Crim. 17036

Petitioner seeks a writ of habeas corpus claiming that he is improperly incarcerated as a parole violator without having been accorded parole revocation hearings mandated by Morrissey v. Brewer (1973) 408 U.S. 471. We agree in part with petitioner but for reasons hereinafter stated hold that he is not entitled to relief.

Petitioner was convicted in 1971 of the felony of issuing a check without sufficient funds in the bank to cover the same and was sentenced to the state prison for the term prescribed by law. Thereafter, his term was fixed by the Adult Authority (Authority) at four years. In May 1972 he was released on parole in San Bernardino County. It appears from parole officers' reports that on July 7, 1972, petitioner issued to an automobile dealer a check in the sum of $4,308 which when presented for payment was returned to the dealer because of insufficient funds. At approximately the same time petitioner vacated his apartment without giving a required notification to his parole officer. On July 8 petitioner was involved

in an accident when his vehicle struck another vehicle which was stopped at a traffic control light. He was arrested on a misdemeanor charge of driving while under the influence of an intoxicating liquor, commonly referred to as drunk driving (Veh. Code, § 23102, subd. (a)) and a breath analyzer test revealed a .25 percent blood alcohol content.

Petitioner failed to appear in court in answer to the foregoing charge and a bench warrant was issued for his arrest. He was arrested as a parole violator (Pen. Code, § 3056) on July 31 in Inyo County when he attempted to cash a check. On September 14 petitioner entered a plea of guilty to the drunk driving charge and thereafter served 30 days in the county jail.

Prior to petitioner's return to custody the Authority had ordered on July 28 that petitioner's parole be suspended and that he be returned to prison "pending further determination" of parole violations. (See People v. Vickers (1972) 8 Cal.3d 451, 461.) On September 26, while petitioner was still confined on the drunk driving conviction, specifications of parole violations were prepared. These included the leaving of the San Bernardino area without notification to his parole officer, writing a check without sufficient funds in the bank to cover the same and operating a vehicle while under the influence of intoxicating liquor in violation of Vehicle Code section 23102, subdivision (a), "as evidenced by his conviction" therefor. On October 20 the Authority again ordered that parole be suspended and that petitioner be returned to prison "for revocation proceedings."

On October 24, while still in the San Bernardino County jail although the term of confinement for the drunk driving conviction had expired, petitioner was

given a copy of the charges of parole violation and a notice which advised him that he was entitled to a prerevocation hearing. (See People v. Vickers, supra, 8 Cal.3d 451, 456–457.) On that same day petitioner made a written request for such a hearing. Petitioner was transferred to prison on November 2, however, without the holding of a prerevocation hearing.

After the order to show cause was issued herein an in-prison parole revocation hearing was held on February 9, 1973. Petitioner pleaded not guilty to all charges of parole violation, but was found guilty as charged on all counts, and parole was formally revoked.

The initial issue is one which we have independently considered and resolved adversely to the People. In response to petitioner's complaint that he has been denied the prerevocation hearing mandated by *Morrissey* the People assert that *Morrissey* is inapplicable in those instances where the conduct constituting the charged violation is also charged as a new crime. In the case of In re Valrie, *ante* p. ____, filed this date we reject the People's claim of such nonapplicability of *Morrissey* and hold that the petitioner in that case was entitled to a timely prerevocation hearing which conformed to *Morrissey* standards although his alleged misconduct was also independently charged as a new crime. The petitioner in the instant case was likewise entitled to a prerevocation hearing.

The entitlement to a prerevocation hearing does not necessarily mean a hearing which is independent of collateral criminal proceedings involving the same course of alleged misconduct. In the case of In re Law (1973) 10 Cal.3d 21 we considered whether "the preliminary hearing provided for in our Penal Code in the case of a felony (see §§ 859-883) or the trial itself

in the case of a misdemeanor may also serve as the probable cause hearing mandated by *Morrissey*. . . ." We concluded that the procedures afforded through the holding of a preliminary hearing "are inclusive of or may be made to conform to the proceedings mandated in *Morrissey*. . . ." (*Id.*, at p. 27.) We were less certain that misdemeanor proceedings, as apparently had in the instant case, would in each instance conform to *Morrissey* requirements for a prerevocation hearing grounded on the same course of conduct. Our chief concerns in such instances were, first, the timeliness of a misdemeanor trial and, second, the unavailability of a written record of trial proceedings.[1]

We also stated in *Law* that the utilization of criminal proceedings for the secondary purpose of prerevocation hearings would require as a matter of due process "that a parolee have fair notice of the nature and effect of a hearing intended to serve such a dual purpose." (*Id.*, at p. 27.)

---

[1] Our statement in *Law* is as follows: "In the case when a parolee is accused of a new criminal offense which is charged as a misdemeanor those protections afforded during the course of the trial may in appropriate cases be sufficiently inclusive of the probable cause hearing procedures mandated by *Morrissey* to serve, *with proper notice or by agreement between the parolee and the Authority*, such dual purposes. We are constrained to note, however, two difficulties which may preclude effective use of such suggested combined procedure. . . .

"First, absent waiver or defense delay, trial on a misdemeanor may be postponed as long as 30 to 45 days following arraignment. . . . We do not herein adhere to the view that in cases where there has been a substantial lapse of time from arrest to disposition that the mandate of *Morissey* . . . has been satisfied.

"Second, . . . transcripts of the trials of misdemeanors are rarely readily available and indeed, generally cannot be obtained at all." (*Id.*, at pp. 27–28; emphasis added.)

It appears in the instant case that the Authority might have sought to arrange that petitioner's trial for violation of Vehicle Code section 23102, subdivision (a), serve also as a prerevocation hearing. However, no such effort was made and petitioner cannot be deemed to have been given a prerevocation hearing by virtue of his conviction when he had no notice that such proceedings would also serve to satisfy *Morrissey* requirements.

This court in *Law* and the United States Supreme Court have made it clear that determinations necessary to revocations comporting with due process may be made by other procedures than those prescribed in *Morrissey*. The high court stated that it was obvious that "a parolee cannot relitigate issues determined against him in other forums, as in the situation presented when the revocation is based on conviction of another crime." (Morrissey v. Brewer, supra, 408 U.S. 471, 490.) At the time petitioner here requested a prerevocation hearing he already had entered a guilty plea to and had been convicted of another crime, and his alleged parole violations were, in part, predicated upon such conviction. It thus appears that all substantive factual findings necessary to a conclusion that there was probable cause to establish a violation had occurred. In People v. Vickers, supra, 8 Cal.3d 451 we considered the situation where no factual issues were raised at the hearing on revocation and stated: "There is nothing in the opinion [in *Morrissey*] which forecloses a summary resolution if an undisputed course of conduct constitutes, as a matter of law, a violation of one or more conditions of parole." (*Id.*, at p. 457, fn. 6.) Our comment in *Vick-*

ers was made in reference to a revocation hearing but is equally applicable to the prerevocation hearing.[2]

Petitioner's conviction thus foreclosed the question of whether he had committed particular acts alleged as a basis for parole violation but it did not foreclose his right to a prerevocation hearing. In fact, our comment in *Vickers* contemplates a hearing for purposes of a determination whether the substantive issues are in fact undisputed and, if so, the legal effect thereof. It is thus clear that in all instances of alleged parole violations within this state a parolee who has not waived his right is entitled to a prerevocation hearing as mandated by *Morrissey*. (See In re Valrie, *ante* p. ____; Sutherland v. D.C. Parole Board (D.C.

[2] The procedural rights mandated by *Morrissey* are applicable only in those instances wherein a parolee has been physically deprived of his conditional liberty pursuant to a claimed parole violation. (Morrissey v. Brewer, supra, 408 U.S. 471, 482.) If he is taken into custody on new criminal charges without having been arrested as a parole violator or subjected to a "parole hold" (see In re Law, supra, 10 Cal.3d 21, fn. 2), *Morrissey* is inapplicable and continues to be inapplicable until such time as he is subjected to restraint as a parole violator, although a continuing, unreasonable delay in so charging him may raise other due process issues.

We note also that when there has been a deprivation of a parolee's conditional liberty because of alleged parole violations, the circumstances may be so markedly different from those contemplated in *Morrissey* that due process would not require blind obedience to each step of the revocation procedures enunciated by *Morrissey*. (See Small v. United States (10th Cir. 1970) 421 F.2d 1388, 1389.) When, for instance, a parole violation is charged only after a criminal conviction and in part because of such conviction, the factual issues resolved in the criminal proceedings are foreclosed and the parolee cannot relitigate them. (Morrissey v. Brewer, supra, 408 U.S. 471, 490.) As a *Morrissey* prerevocation hearing seeks only to establish probable cause to believe a parole violation has occurred it is manifest that all that need be demonstrated at such hearing would be the fact of a post-parole conviction, the fact that such conviction violated a condition of parole, and the further fact that such conviction was suffered by the particular parolee.

1973) ____ F.Supp. _____.) Although criminal proceedings involving the same course of conduct may also serve the purpose of a prerevocation hearing, as we have suggested in *Law*, or may be summarily disposed of as suggested in *Vickers* (see also fn. 2, supra), no determination of probable cause was ever made in the instant case because there were no proceedings which could be deemed to have satisfied *Morrissey* requirements for a prerevocation hearing.[3]

[3] In the case of In re Scott (1973) 32 Cal. App.3d 124 the Authority revoked parole upon a violation grounded on conduct which also resulted in the conviction of a new crime. It was held in that case a prerevocation hearing is unnecessary when revocation is based upon the conviction of a new crime. To the extent that *Scott* is inconsistent with our views herein it is disapproved.

We do not reach the question whether a prerevocation hearing may be dispensed with in those instances when the revocation hearing itself is conducted at a time and place and in a manner which otherwise satisfies *Morrissey* requirements for a prerevocation hearing. We note in that connection, however, that as reason for a prerevocation hearing the court stated in *Morrissey*: "There is typically a substantial time lag between the arrest and the eventual determination by the parole board whether parole should be revoked. Additionally, it may be that the parolee is arrested at a place distant from the state institution, to which he may be returned before the final decision is made concerning revocation. Given these factors, due process would seem to require that some minimal inquiry be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources available." (Morrissey v. Brewer, supra, 408 U.S. 471, 485.)

In Richardson v. New York State Board of Parole (1973) 341 N.Y.S.2d 825, the court held that none of a parolee's rights had been violated when, without a preliminary hearing, parole was revoked at a hearing held only 19 days after the arrest. The court noted that the need for a *Morrissey* preliminary hearing may be "obviated if the Board proceeds immediately upon a final revocation hearing." (*Id.*, at p. 827; see also Walczak v. Department of Correctional Services (1973) 342 N.Y.S.2d 146, where the final revocation hearing was held within 21 days of the arrest of the parolee.)

Having concluded that petitioner was entitled to a prerevocation hearing we next consider whether he may be held to have waived such right in the particular circumstances here present. We have no doubt that the right may be expressly waived and it may be deemed to have been waived when a parolee, with knowledge of the right, fails to assert it in a timely manner. (Compare People v. Wilson (1963) 60 Cal. 2d 148 [waiver of a right to a speedy trial by failure to assert in a timely fashion].) In the instant case, however, petitioner's written request that a prerevocation hearing be accorded to him was made on the very day on which notice of parole revocation charges and of his right to a prerevocation hearing was served. Certainly his request negated any implication that he intended to forego a prerevocation hearing and, in the absence of other evidence bearing on the question, petitioner cannot be deemed to have waived his right thereto.[4]

The denial of petitioner's right to a timely prerevocation hearing notwithstanding his timely effort to assert it does not necessarily mean that he is automatically entitled to relief therefrom. Due process does not require that a parolee benefit from such a denial, but only that no unfairness result therefrom. Accordingly, in the absence of evidence that the Authority is not making a good faith effort to comply with the mandates of *Morrissey* and our decisions in

[4] This is not a situation where the parolee was given notice of the charges, informed of his right to a prerevocation hearing, advised that he would be deemed to have waived such hearing in the absence of a timely request therefor, and thereafter he elected not to make such a timely request. Under such circumstances there would be no denial of due process in withholding a prerevocation hearing as such conduct would constitute a waiver of such right.

this respect, a parolee whose parole has been revoked after a properly conducted revocation hearing is not entitled to have the revocation set aside unless it appears that the failure to accord him a prerevocation hearing resulted in prejudice to him at the revocation hearing.[5]

We have not heretofore considered the measure of prejudice necessary to the granting of relief from a restraint of liberty resulting from improper proceedings before an administrative agency. In the familiar judicial context, however, appellate courts have often considered the measure of prejudice resulting from a lack of compliance with federal constitutional mandates in criminal proceedings. Prejudice is not presumed merely because of a failure to comply and in particular instances denials of constitutional proportions may be deemed harmless. However, "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." (Chapman v. Cali-

[5] A different rule prevails in criminal proceedings. When a preliminary hearing has been wrongfully denied "prejudice must be presumed." (People v. Elliot (1960) 54 Cal.2d 498, 506.) The rationale for the rule, however, is one which goes to the jurisdiction of the court. "The theory of these cases is that where the accused is not legally committed within the meaning of section 955 of the Penal Code, the commitment is voidable. Upon proper objection, the superior court has no jurisdiction to proceed. It is the same as if no preliminary examination at all had been held, and is analogous to the situation where no evidence to connect the accused with the crime is introduced at the preliminary examination. In such event, of course, the information must be quashed." (*Id.*, at p. 503.)

A prerevocation hearing is distinguishable in principle from a preliminary hearing in criminal proceedings as the existence of probable cause is not necessary to the establishment of *jurisdiction* over the parolee. The Authority has a continuing jurisdiction over its parolees (Pen. Code, § 3056) and a proper finding of probable cause for a parole violation is necessary to insure fairness in the revocation proceedings.

fornia (1967) 386 U.S. 18, 24.) No reason appears why the same standard would not insure due process fairness to a parolee who was wrongfully denied a timely prerevocation hearing, and we adopt that standard in testing whether a parolee is prejudiced by the denial of a timely prerevocation hearing.

It is manifest that in the instant case petitioner cannot establish that he was prejudiced by the denial of such a timely prerevocation hearing. He does not suggest any manner in which he can successfully challenge the fact of his post-parole conviction of driving while under the influence of intoxicating liquor and the fact that such conviction constituted a violation of a condition of parole. He presents nothing which even suggests that all factual issues to be presented at the summary prerevocation hearing to which he was entitled would not necessarily have been resolved against him. (See fn. 2, supra.) He thus fails completely to demonstrate prejudice (see In re Swain (1949) 34 Cal.2d 300), and we can declare without reservation that the denial in this case was harmless beyond a reasonable doubt. (Chapman v. California, supra, 386 U.S. 18, 24.)

We have rejected, as indicated by our foregoing discussion, petitioner's contention that in all instances of a wrongful denial of a timely prerevocation hearing a parolee must be restored to parole status.[6] We would impose such a severe sanction only on a showing that the Authority is unresponsive to mandates of *Morrissey* and its progeny and must be coerced to

[6] Where there was an unreasonable delay under a federal statute requiring a revocation hearing within a reasonable time after arrest for a parole violation, the petitioner was restored "to the same circumstances and conditions of release on parole" as existed when first granted. (United States v. Kenton (1966) 256 F.Supp. 296, 301.)

comply therewith. No showing of this nature has been made. We are not unmindful, however, of the likelihood that a parolee who is charged with a parole violation based on a post-parole criminal conviction will seldom be able to demonstrate prejudice resulting from the denial of a requested prerevocation hearing. We will not anticipate that the Authority will, for that or any reason, intentionally withhold hearings to which a parolee is entitled.[7]

The foregoing does not yet conclude our inquiry. Petitioner further contends that because there was a delay of more than six months between his arrest as a parole violator and the revocation of his parole, or a delay of almost four months between the date upon which he requested compliance with *Morrissey* requirements and the revocation of parole, he is en-

[7] We take notice of the very extensive changes in its practices which *Morrissey* and its progeny require of the Authority. We note also that the Authority has undertaken to make such changes, although it is apparent that in its numerous applications and briefs submitted to this court in this and other cases since *Morrissey* the Authority has consistently taken the position that a prerevocation hearing is not required when conduct alleged to constitute violations of parole is also charged as a new crime. It appears that the practice has been, in the absence of what the Authority deemed to be a clear direction in *Morrissey*, to deny prerevocation hearings in such instances. Although we have now rejected this position on the merits (In re Valrie, *ante*, p. ____), we conclude that the Authority relied and acted in good faith on its misinterpretation of *Morrissey*. We have every reason to believe that it will now implement the directions contained in this and our other pertinent opinions.

An individual parolee whose right to a timely hearing has been wrongfully denied and who is, for that reason, wrongfully restrained, may take action to obtain his hearing. He may petition the superior court for a writ of habeas corpus. Should that court determine the restraint to be unlawful it may order the Authority either to release the petitioner on parole or to conduct a timely prerevocation hearing. (See In re Valrie, *ante*, pp. ____, ____.)

titled to be restored to parole. *Morrissey* provides: "The revocation hearing must be tendered within a reasonable time after the parolee is taken into custody. A lapse of two months, as the state suggests occurs in some cases, would not appear to be unreasonable." (Morrissey v. Brewer, supra, 408 U.S. 471, 488.) The rule as thus announced in *Morrissey* is one of reasonableness, which requires a balancing of all relevant circumstances. Certainly we would deem two of such circumstances to be the fact of pending criminal proceedings and the restraints otherwise imposed on a parolee charged with a new crime. We also recognize that a parolee may expressly or by implication waive the time within which the state must proceed to the revocation hearing.

The reason for the delay after petitioner's conviction does not appear. He was available and could have been returned to prison by the Authority upon his conviction and sentencing in the misdemeanor proceeding in September. Although he requested a prerevocation hearing in October he thereafter did not pursue it and, as far as appears, was content to let the Authority move at its own pace. At no time insofar as appears did petitioner make any formal or informal objection to the fact that he had not obtained a revocation hearing or that the hearing when had was not timely.

The fundamental right to a timely revocation hearing cannot be denied. That right, however, is no more fundamental than the constitutional right to a speedy trial. (Cal. Const., art. I, § 13; see also Jones v. Superior Court (1970) 3 Cal.3d 734; Barker v. Municipal Court (1966) 64 Cal.2d 806, 812.) Such latter right, however, is deemed waived where an accused fails to

object to a trial set beyond what otherwise may have been a reasonable period of time after the bringing of criminal charges. The failure to object in such a case presumes consent. (People v. Rongo (1914) 169 Cal. 71; People v. George (1949) 91 Cal.App.2d 537, 541–542, 544.) When a parolee charged with parole violations intends to preserve his right to a determination on the merits within the limits of "reasonable time" as delineated in *Morrissey* he, like an accused charged with a crime, cannot sit idly by and be heard to complain only after proceedings have been concluded adversely as to him. Certainly he cannot be accorded greater protection in preserving his conditional liberty than an accused charged with the commission of a criminal offense. (See People v. Wilson (1963) 60 Cal.2d 139.) In the absence of a record that petitioner took affirmative action to preserve his right to a timely revocation hearing, he is deemed to have consented to the delay of which he now complains. He is thus entitled to no relief.

While this matter was pending before us petitioner filed an application for release from restraints, either upon his own recognizance or the fixing and posting of bail. We have held that a parolee taken into custody pursuant to a "parole hold" was not entitled to release on bail. (In re Law, supra, 10 Cal.3d 21.) Although petitioner here is not now held pursuant to a "parole hold" as in *Law*, the rationale of the rule in that case compels the same conclusion whatever the technical nature of the claimed unlawful restraint arising out of an alleged parole violation. Clearly, if petitioner was not entitled to release on bail he was not entitled to release on his own recognizance.

The application for release on bail or on petitioner's own recognizance is denied. The order to show cause is discharged, and the petition for the writ is denied.

WRIGHT, C.J.

We concur:
McCOMB, J.
TOBRINER, J.
BURKE, J.
SULLIVAN, J.
CLARK, J.

APPENDIX B

FILED
May 9, 1973
COURT OF APPEAL—THIRD DISTRICT
WILFRIED J. KRAMER, *Clerk*
By _____, *Deputy*

(CERTIFIED FOR PUBLICATION)

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE THIRD APPELLATE DISTRICT

In re LAWRENCE L. LA CROIX on Habeas Corpus.	3 Crim. No. 6836

Petitioner, reimprisoned on charges of parole violation, seeks a writ of habeas corpus on the ground that the Adult Authority has denied him the hearings required by Morrissey v. Brewer (1972) 408 U.S. 471 [33 L.Ed.2d 484].

THE MORRISSEY CASE

Morrissey holds that, under the due process clause of the Fourteenth Amendment, a parolee is entitled to two separate hearings during "the typical process of parole revocation." The first hearing is "in the nature of a 'preliminary hearing' " conducted "at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available." The ultimate function of the hearing officer at that initial stage is "to determine whether there is probable cause or reasonable ground to believe that the arrested parolee has committed acts that would constitute a violation of parole conditions." De-

termination of that issue adverse to the parolee warrants his continued detention and return to the state correctional institution pending the final decision of the parole board on revocation. The preliminary hearing officer can be "someone such as a parole officer other than the one who has made the report of parole violations or has recommended revocation." (408 U.S. at pp. 484–487 [33 L.Ed.2d at pp. 496–498].)

Prior to the final decision by the parole authority, and within a reasonable time after the parolee is taken into custody, a second hearing must be held under *Morrissey* "if it is desired by the parolee . . . ." The latter hearing—the revocation hearing itself—must be before "a 'neutral and detached' hearing body such as a traditional parole board . . . ." The second hearing "must be the basis for more than determining probable cause; it must lead to a final evaluation of any contested relevant facts [e.g., whether parole conditions were violated] and consideration of whether the facts as determined warrant revocation [e.g., whether there are mitigating circumstances]." (408 U.S. at pp. 487–489 [33 L.Ed.2d at pp. 498–499].)

Morrissey also specifies certain procedural rights which must be allowed the parolee in connection with each hearing. Common to both hearings are his right to advance notice of the claimed violations of parole, and his entitlement to be heard in person and to present witnesses and documentary evidence. At the *Morrissey* preliminary hearing, "[o]n request of the parolee, persons who have given adverse information on which parole revocation is to be based are to be made available for questioning in his presence. However, if the hearing officer determines that the informant would be subjected to risk of harm if his identity were disclosed, he need not be subjected to confronta-

tion and cross-examination." At the later revocation hearing, the parolee has a similar "right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation) . . . ." (408 U.S. at pp. 486–489 [33 L.Ed.2d at pp. 497–499].)

The *Morrissey* decision was filed June 29, 1972. It declares that its procedural demands "are applicable to future revocations of parole . . . ." (408 U.S. at p. 490 [33 L.Ed.2d at p. 499].)

FACTS

In the case at bench, the controlling facts alleged in the petition, return, and traverse are undisputed.

Petitioner was paroled to San Bernardino County on May 8, 1972. On July 28 his parole was suspended and he was ordered returned to prison "pending further determination" of parole violation charges. He was arrested as a parole violator on July 31 in Bishop, Inyo County. On September 13 he was released from the custody of the Inyo County sheriff to the custody of the sheriff of San Bernardino County.

On September 26, 1972, a written specification of charges was addressed to the Adult Authority by petitioner's parole supervisors. The charges specified were (1) that petitioner violated "condition 1" of his parole by leaving the San Bernardino County area the previous July without notifying his parole agent; (2) that petitioner violated "condition 2" of his parole by operating a vehicle while intoxicated near Chino on July 8, 1972, in violation of Vehicle Code section 23102, subdivision (a), "as evidenced by his conviction in San Bernardino Municipal Court," where he was sentenced on September 14; and (3) that in July 1972

he violated "condition 4" of his parole by writing a check without sufficient funds and by failing to comply with an agreement with the payee in Pomona to deposit funds to cover the check.[1]

It appears—from his traverse in this court—that petitioner did indeed, in a San Bernardino Municipal Court on September 14, 1972, plead guilty to drunk driving. We are further informed by the parties that, as a consequence of the latter conviction, he was jailed in San Bernardino County on September 14 as a condition of probation and that the jail term expired on October 13. On October 20 parole was again ordered suspended and petitioner was ordered returned to prison "for revocation proceedings."

On October 24, while still incarcerated at the San Bernardino County Jail (even though his term for drunk driving had expired), petitioner was given a "copy of the alleged Parole Violation charges"[2] and a "Notice of Rights to Pre-Revocation Hearing." The latter notice informed petitioner that he was entitled to a "Pre-Revocation [i.e., preliminary] hearing within ten (10) days," where he could testify concerning the parole violation charges, present documentary evidence and witnesses, and interrogate adverse informants. That same day (October 24), in the presence of a parole officer, petitioner made a written

[1] The nature of the cited parole conditions has not been specified to us either by petitioner or by the Attorney General, but may be inferred from the undisputed facts alleged.

[2] We quote the petition. Since it also alleges that "the San Bernardino County Jail . . . [is] an area reasonably close to the locality where the alleged Violation occurred," we infer that the "copy of the alleged Parole Violation charges" which petitioner received on October 24 was a copy of the written specification of charges prepared by his parole supervisors on September 26.

request for a pre-revocation hearing. On November 2, however, without the requested hearing, petitioner was removed from jail and was taken to the Reception Guidance Center at Chino; he was transferred six days later to the California Conservation Center at Susanville ("approximately 600 miles from the alleged violation").

On November 20, 1972, according to the return, "[p]etitioner received a copy of the charges against him as to the violation of parole conditions . . . ."[3]

On December 20, shortly after we issued an order to show cause, petitioner was transferred to the California Institution for Men, Chino. The return further shows that an "in-prison parole revocation" hearing for petitioner was "scheduled to be held" at the Chino facility on or before February 9, 1973. Until oral argument on February 22, 1973, we had nothing before us to show whether petitioner's scheduled revocation

[3] The notice referred to in the return is attached as an exhibit to it. The notice, dated November 15, 1972, does not comport with due process. It states that a hearing on the charges will be held at a date and place "to be determined . . . ." In describing the charges, it merely alleges that petitioner "did violate Condition 1 of his Parole agreement . . . did violate Condition 2 of his Parole agreement . . . did violate Condition 4 of his Parole agreement."

It seems fundamental that the notice required by Morrissey v. Brewer, supra, 408 U.S. 471 [33 L.Ed.2d 484], must be notice adequate to enable the parolee to plead to the charges of parole violation, to prepare any defense he may have, and to assert the Adult Authority's prior determination of the charges if they are ever brought again. Accordingly, whether in the context of the *Morrissey* preliminary hearing or later revocation hearing, the parolee must be given "timely formal notice of (1) the conditions which he is accused of violating, (2) the *manner* in which he is accused of violating such conditions, and (3) the *date* and *place* of the proposed hearing" (Riggins v. Rhay (1969) 75 Wash.2d 271, 286 [450 P.2d 806, 815]) (emphasis added). (Cf., People v. Jordan (1971) 19 Cal. App.3d 362, 368; In re McDonald (1920) 45 Cal.App. 480, 486.)

hearing had been held, and if so, what transpired at such hearing. At the oral argument, the Attorney General filed an evaluation and dispositional report of the Adult Authority (presenting us with a seeming *fait accompli*) which indicates that an in-prison revocation hearing was held at Chino on February 9; that petitioner pled not guilty to all three parole violation charges; that he was found "guilty as charged" on all counts; and that his parole was thereupon formally revoked.

No preliminary hearing on the parole violation charges has ever been held.

CONTENTIONS

Morrissey v. Brewer, supra, 408 U.S. 471 [33 L.Ed. 2d 484], was decided one month prior to the suspension of petitioner's parole. His due process rights are therefore governed by *Morrissey*. (See, People v. Vickers (1972) 8 Cal.3d 451, 462.)

In response to petitioner's complaint that he has never had a *Morrissey* preliminary (i.e., pre-revocation) hearing, the Attorney General contends that "In this case since one of the charged violations is the conviction of a new crime [i.e., drunk driving], no hearing to determine probable cause is necessary. . . . There is no danger in such a case that the parolee's liberty is being affected without probable cause." The Attorney General claims support in *Morrissey's* statement that "Obviously a parolee cannot relitigate issues determined against him in other forums, as in the situation presented when the revocation is based on conviction of another crime" (408 U.S. at p. 490 [33 L.Ed.2d at p. 499]).

The Attorney General's contention cannot be sustained. It attempts to carve out—from the dictum [4] of *Morrissey*—an exception to *Morrissey* which the United States Supreme Court did not declare.[5] *Morrissey* included the preliminary hearing on the parole violation charges among the "basic requirements" of due process; the high court did not exclude such requirement "in the situation presented when the revocation is based on conviction of another crime." The court merely excluded the parolee's relitigation of "issues determined against him" in the criminal prosecution leading to such conviction. (408 U.S. at p. 490 [33 L.Ed.2d at p. 499].)

The basic flaw in the Attorney General's argument is that it presupposes that parole violation charges drafted by parole supervisors will, in all cases, accurately set forth the facts. It is unrealistic to presume such infallibility. *Morrissey* emphasizes that society, as well as the parolee, "has an interest in not having parole revoked because of erroneous information...." (408 U.S. at p. 484 [33 L.Ed.2d at p. 496].)

When a purported new conviction is alleged in a charge of parole violation (even where documented by an abstract of judgment), compliance with *Morrissey* requires, in our view, that an opportunity be available to the parolee to show that he was not the person convicted (*cf.*, People v. Willison (1931) 116 Cal.App.

[4] *Morrissey* did not involve parole violations amounting to conviction of a new crime. (See, 408 U.S. at pp. 472–474 [33 L.Ed. 2d at pp. 489–490].)

[5] Additionally, the Attorney General relies upon State v. Morales (1972) 120 N.J.Super. 197 [293 A.2d 672]. That case is not authoritative. It not only applied *Morrissey* to a pre-*Morrissey* revocation (compare, People v. Vickers, supra, 8 Cal.3d at p. 462) but also—without analysis—relied upon the same dictum from *Morrissey* which is the foundation of the Attorney General's argument.

157, 159–160), that the offense of which he was convicted was other than the one specified as a parole violation (cf., People v. Morton (1953) 41 Cal.2d 536, 540–541), or that the charge alleging the conviction—except as to matters actually determined in the criminal prosecution—is in other respects inaccurate (see, Mays v. Nelson (9th Cir. 1972) 464 F.2d 585).[6] Such opportunity should be made available to the parolee at a *Morrissey* preliminary hearing, for, as *Morrissey* points out, "[t]here is typically a substantial time lag between the arrest and the eventual determination by the parole board whether parole should be revoked" (408 U.S. at p. 485 [33 L.Ed.2d at p. 496]), and the parolee's ability to refute the charge of a new conviction may hinge upon whether "information is fresh and sources are available" (*ibid.*).[7]

The Attorney General asserts that "To require a pre-revocation hearing in all cases would, in the case

[6] Mays v. Nelson, supra, 464 F.2d 585, well illustrates the unfairness which can result when infallibility is ascribed to a parole officer's description of judicial proceedings. While on parole from the California prison system, Mays was charged with battery, a misdemeanor (Pen. Code § 242). The latter proceeding culminated in his conviction upon a plea of guilty of disturbing the peace, a misdemeanor (Pen. Code, § 415). In subsequently suspending—and then revoking—Mays's parole, the Adult Authority relied in part upon an erroneous written report from his parole officer to the effect that, instead of battery, Mays had originally been charged with *assault with a deadly weapon*, a felony (Pen. Code, § 245). (See district court opinion, Mays v. Nelson (N.D.Cal. 1971) 323 F.Supp. 587.)

[7] The Attorney General quotes In re Cleaver (1968) 266 Cal.App. 2d 143, at page 158, for the proposition that "To allow inquiry into the merits of a charge of parole violation pending the hearing of a criminal case on which it is based would produce a chaotic situation." Unlike *Cleaver*, however, the parole violation charge in the instant case alleges a prosecution which has terminated in conviction rather than one still pending in the trial court.

where the revocation proceedings are based upon the conviction of a new crime, amount to a meaningless hearing at which probable cause for the parole violation will always be found since the hearing officer will be faced with the abstract of judgment itself." In the same vein, the Attorney General contends that "Even if the parolee were to claim at such [preliminary] hearing that he was not the person so convicted or that he was convicted of some other offense, the mere identity of name itself on the [abstract of judgment] provides an inference that he was the party so convicted."

The latter argument uses too broad a brush. Nothing in *Morrissey* precludes the parolee from making a knowing and intelligent waiver of the preliminary (i.e., pre-revocation) hearing; for that reason, the hearing will not literally be required "in all cases" contemplated by the Attorney General. Moreover, by arguing that the abstract of judgment will render the hearing "meaningless," the Attorney General implies that the recitals in such abstracts are invariably free from error—a suggestion which, unfortunately, is not the case. (See, e.g., People v. McKissack (1968) 259 Cal.App.2d 283, 288–289.) The argument also overlooks that, where a new conviction is alleged in a written specification of parole violation charges, the written specification (even if accompanied by an abstract of judgment) may contain prejudicial misinformation about the circumstances surrounding the new conviction—misinformation which would not be refuted by an abstract of judgment and which should be nipped in the bud. (See fn. 6, supra, and accompanying text.)

An even graver defect mars the Attorney General's claim that, for the purpose of a *Morrissey* preliminary

hearing, an abstract of judgment on the new conviction would, ipso facto, "always" produce a finding of probable cause. *Morrissey* makes clear that a parolee is entitled to be heard on the issue of probable cause and has a limited right to cross-examine on that subject. Giving unchallengeable effect to the abstract of judgment would reduce the *Morrissey* preliminary hearing to an ex parte proceeding—thus emasculating the *Morrissey* guarantee. (Cf., Jennings v. Superior Court (1967) 66 Cal.2d 867, 880; see also, Jones v. Superior Court (1971) 4 Cal.3d 660, 666–668.)

Moreover, in requiring a preliminary hearing, *Morrissey* specifies that "the determination that reasonable ground exists for revocation of parole should be made by someone not directly involved in the case"; and *Morrissey* declares that the "parole officer . . . who has made the report of parole violations or has recommended revocation" is ineligible to make the determination of probable cause. (408 U.S. at pp. 485–486 [33 L.Ed.2d at p. 497].) In the present case, where the new conviction has been alleged in charges made by petitioner's parole supervisors, acceptance of the Attorney General's argument would, in effect, leave the decision as to probable cause with the very parole officers whom *Morrissey* has disqualified.

We note also the requirement of *Morrissey* that the preliminary hearing officer make "a summary, or digest, of what occurs at the hearing in terms of the responses of the parolee and the substance of the documents or evidence given in support of parole revocation and of the parolee's position." (408 U.S. at p. 487 [33 L.Ed.2d at p. 498].) *Morrissey* further declares that the *second* stage of parole revocation—the revocation hearing itself—"should be flexible enough to consider evidence including letters, affidavits, and

other material that would not be admissible in an adversary criminal trial." (408 U.S. at p. 489 [33 L.Ed. 2d at p. 499].) The high court's latter statement is broad enough to permit the introduction, at the revocation hearing, of the preliminary hearing officer's summary or digest of the evidence. Petitioner was entitled to a preliminary hearing on all charges "at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available" (408 U.S. at p. 485 [33 L.Ed.2d at p. 496]). Denial of a preliminary hearing on even one of several parole violation charges, and the resultant lack of any summary or digest thereon by the hearing officer, could prove extremely prejudicial to a parolee at the revocation hearing when relevant information might no longer be fresh or available.

Morrissey indicates that no preliminary hearing is required where parole is revoked on the basis of parole violation charges admitted by the parolee to the parole board. (408 U.S. at pp. 477, 490 [33 L.Ed.2d at pp. 492, 499]; see also, People v. Vickers, supra, 8 Cal.3d at p. 457, fn. 6.) However, petitioner's entitlement to a preliminary hearing on all charges—including the allegation of a new conviction—was in no way lessened by his subsequent admission *to this court* that he in fact pleaded guilty to drunk driving on September 14, 1972. Absent any showing that petitioner has admitted the charges to the parole board, the denial of a preliminary hearing has deprived him of due process.

Morrissey's requirement of a preliminary hearing would be meaningless if the Adult Authority could cure the lack of a preliminary hearing by the mere

holding of a revocation hearing.[8] The *Morrissey* case requires *both* hearings during the typical process of parole revocation. The omission of a preliminary hearing on charges of parole violation is analogous to the absence of a preliminary examination on criminal charges prosecuted thereafter by information. If the latter examination has not been waived, prejudice is presumed from the lack of one, and the defect is jurisdictional. (People v. Elliot (1960) 54 Cal.2d 498, 503–507; People v. Brooks (1946) 72 Cal.App.2d 657, 661.) Petitioner's admission of the new conviction to this court does not discharge this court's obligation to assure to every parolee the procedural due process dictated by *Morrissey*. As said by our state Supreme Court in a related context: "When we speak of administering 'justice' in criminal cases, under the English or American system of procedure, we mean something more than merely ascertaining whether an accused is or is not guilty. It is an essential part of justice that the question of guilt or innocence shall be determined by an orderly legal procedure, in which the substantial rights belonging to defendants shall be respected." (People v. O'Bryan (1913) 165 Cal. 55, 65; to the same effect, see People v. Elliot, supra, at pp. 506–507.) "Error that results in the deprivation of a basic right necessarily requires reversal to preclude prejudice to the judicial process and to the procedural rights of a litigant even though there might be equally fair alternatives consonant with due proc-

[8] Statements to the contrary in Richardson v. New York State Bd. of Parole (1973) ____ A.D.2d ____ [341 N.Y.S.2d 825], are dictum; the court there expressly noted that the validity of the parolee's revocation hearing was not in issue before it, nor did the court assume such validity.

ess." (People v. Gaines (1962) 58 Cal.2d 630, 642 (dissenting opinion by Traynor, J.); cf., People v. Billon (1968) 266 Cal.App.2d 537, 540–541.)

DISPOSITION

A more difficult question concerns the result which should follow from the wrongful denial to petitioner of a *Morrissey* preliminary hearing. The disposition to be had following such denial appears to be without any reported appellate precedent in the United States, undoubtedly because *Morrissey* is so recent.

Prior to the decision in *Morrissey,* federal cases drew an analogy between delays in parole *revocation* hearings and denials of speedy trial. (See, United States v. Kenton (2d Cir. 1961) 287 F.2d 534, 536; United States v. Kenton (D.Conn. 1967) 262 F.Supp. 205, 209.) Since it will best protect the rights of both society and the parolee, the analogy to delays in trial is appropriate in assessing the effect of denial of a *Morrissey* preliminary hearing. (McLucas v. Oswald (1973) 40 A.D.2d 311, ____[339 N.Y.S.2d 760, 764].)

Where an unreasonable time has passed before commencement of a criminal trial, and the defendant seeks pre-trial relief, it is unnecessary that he affirmatively show prejudice. In such circumstances, "Prejudice will be presumed from the violation of this constitutional right. It is enough for the defendant to show that the prosecution has been unreasonably delayed. It will not be presumed that good cause for the delay in fact existed. If there was any good cause it [is] for the prosecution to show it." (Harris v. Municipal Court (1930) 209 Cal. 55, 64; see also, Barker v. Municipal Court (1966) 64 Cal.2d 806, 812–813; People v. Wilson (1963) 60 Cal.2d 139, 151–152.)

It is obviously too late to afford petitioner a prompt preliminary hearing, as *Morrissey* requires (408 U.S. at p. 485 [33 L.Ed.2d at p. 496]). According to the exhibits attached to the return, petitioner was available to the Adult Authority on October 13, 1972, upon completion of his jail term for drunk driving, but he was not removed from jail and returned to the prison system until November 2. As previously stated, petitioner's revocation hearing was not held until a date (February 9, 1973) almost four months removed from the date the jail ended. No preliminary hearing had been held by the time of the revocation hearing—even though seven months had elapsed since the date *Morrissey* was filed. It is clear that by October 24, 1972 (approximately four months after *Morrissey*), the Adult Authority had formulated procedures to afford *Morrissey* preliminary hearings; on October 24 petitioner was given a "Notice of Rights to Pre-Revocation Hearing" and made a written request for such hearing. Under these circumstances, the Attorney General makes no claim that the instant case is one wherein the lack of any preliminary hearing was a consequence of the Adult Authority's need for more time to adjust its procedures to the *Morrissey* holding. It follows that four months without a preliminary hearing (between the end of petitioner's jail term in October and his revocation hearing the following February) was an unreasonable period of time for petitioner to be denied that right.[9]

[9] Prior to *Morrissey*, it appears that three months was roughly the maximum delay that the federal courts would tolerate in the holding of federal parole *revocation* hearings subsequent to the apprehension of parolees. (Marchand v. Director, U.S. Probation Office (1st Cir. 1970) 421 F.2d 331, 335, fn. 5.) For example, in United States v. Kenton, supra, 287 F.2d at p. 536, the Court of Appeals expressed the view that "No argu-

The Attorney General makes no showing whatever of good cause for the failure to hold a preliminary hearing on the parole violation charges that petitioner left the San Bernardino County area without notifying his parole agent, and that he wrote a check without sufficient funds and breached an agreement to deposit funds to cover the check. Thus, applying the analogy of denial of a speedy trial, those two charges and the findings thereon must be stricken, reinstitution of the two charges is barred, and the Adult Authority must exclude—in its future consideration of petitioner's status—all reference to the incidents encompassed by those two charges.

In contrast, as to petitioner's new conviction, it is manifest that the Adult Authority was relying in good faith on its misemphasis of the *Morrissey* dictum when the Authority denied petitioner a preliminary hearing on that charge. We therefore conclude that "good cause" (within the meaning of the speedy trial cases) has been shown in explanation of the latter delay. Although the revocation of petitioner's parole was based in part upon the new conviction, we may not assume that a preliminary hearing officer cannot hereafter impartially examine such charge as to the issue of probable cause. Nor may we assume that the Adult Authority will automatically re-revoke peti-

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ment of administrative convenience can justify holding a parolee in custody for almost 4 months before granting him a statutory hearing on the issue of violation." In *Morrissey* the revocation hearing for each parolee there involved was apparently held within two months after his arrest for parole violation, a lapse of time which the Supreme Court stated would meet its requirement that "[t]he revocation hearing must be tendered within a reasonable time after the parolee is taken into custody." (408 U.S. at pp. 472–476, 488 [33 L.Ed.2d at pp. 489–491, 498].)

tioner's parole if probable cause is found and the charged violation thereafter reaches the parole board in a revocation hearing. (See, In re Brown (1967) 67 Cal.2d 339.)

It is ordered that (1) the Adult Authority strike from petitioner's records the charged violations of Conditions 1 and 4 of his parole and its findings of guilty thereon; (2) the Adult Authority is barred from reinstituting the charged violations of Conditions 1 and 4; (3) in its future consideration of petitioner's status and eligibility for parole, and its fixing of his term, the Adult Authority shall exclude all reference to the incidents encompassed by the charges of violation of Conditions 1 and 4; (4) the Adult Authority strike from petitioner's records its finding that petitioner violated Condition 2 of his parole; (5) the Adult Authority, if it elects to proceed further with the charged violation of Condition 2, shall return petitioner to the County of San Bernardino for a preliminary hearing thereon in conformity with the requirements of Morrissey v. Brewer (1972) 408 U.S. 471 [33 L.Ed.2d 484], and with the views expressed herein, said preliminary hearing to commence within 30 days after this decision becomes final; and (6) if the Adult Authority elects not to proceed further with the charged violation of Condition 2, it shall strike said charge from petitioner's records with the same consequences as to said charge as are specified in respect to the other two charges mentioned in parts (2) and (3) of this paragraph, and, if the Adult Authority makes the latter negative election, peti-

tioner shall be released from prison and restored to parole upon the same conditions of parole which existed prior to July 1972. (CERTIFIED FOR PUBLICATION.)

JANES, J.

We concur:
RICHARDSON, P. J.
FRIEDMAN, J.

CERTIFIED FOR PUBLICATION

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE THIRD APPELLATE DISTRICT

In re
LAWRENCE L. LA CROIX
on Habeas Corpus.

3 Crim. No. 6836

MODIFICATION OF OPINION UPON DENIAL OF REHEARING

BY THE COURT:

The typewritten opinion filed herein on May 9, 1973, is modified as follows:

On page 16, at the end of the first paragraph of text, insert a new footnote 10 which provides (without quotation marks): "The Attorney General argues that, notwithstanding the Adult Authority's failure —without good cause—to hold a *Morrissey* preliminary hearing, the Authority is still entitled to consider the alleged facts underlying the charge that a parolee violated his parole. Cases relied upon by the Attorney General, however, are pre-*Morrissey* decisions (i.e., cases decided before there was any constitutional compulsion to use specific procedures in determining the truth of such charges). Obviously, if the Attorney General's thesis were correct and the Adult Authority could still consider those alleged facts, there would be no point to *Morrissey* at all."

On page 16, at the end of the second sentence in the second paragraph of text, insert a new footnote 11 which provides (without quotation marks): "The

same showing of good cause explains why the Adult Authority waited an unreasonable length of time before it gave petitioner a *revocation* hearing."

Respondent's petition for rehearing is denied. (CERTIFIED FOR PUBLICATION.)

APPENDIX C

CERTIFIED FOR PUBLICATION

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE THIRD APPELLATE DISTRICT

In re
LAWRENCE L. LA CROIX
on Habeas Corpus.

3 Crim. 6836

Petitioner, reimprisoned on charges of parole violation, seeks a writ of habeas corpus on the ground that the Adult Authority has denied him the hearings required by Morrissey v. Brewer (1972) 408 U.S. 471 [33 L.Ed.2d 484].

THE MORRISSEY CASE

Morrissey holds that, under the due process clause of the Fourteenth Amendment, a parolee is entitled to two separate hearings during "the typical process of parole revocation." The first hearing is "in the nature of a 'preliminary hearing' " conducted "at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available." The ultimate function of the hearing officer at that initial stage is "to determine whether there is probable cause or reasonable grounds to believe that the arrested parolee has committed acts which would constitute a violation of parole conditions." Determination of that issue adverse to the parolee warrants his continued detention and return to the state correctional institution pending the final decision of the parole board on revocation. (408 U.S. at pp. ____ [33 L.Ed.2d at pp. 496–498].)

Prior to the final decision by the parole authority, and within a reasonable time after the parolee is taken into custody, a second hearing must be held under *Morrissey* "if it is desired by the parolee. . . ." The latter hearing—the revocation hearing itself—must be before "a 'neutral and detached' hearing body such as a traditional parole board. . . ." The second hearing "must be the basis for more than determining probable cause; it must lead to a final evaluation of any contested relevant facts [e.g., whether parole conditions were violated] and consideration of whether the facts as determined warrant revocation [e.g., whether there are mitigating circumstances]." (408 U.S. at pp. ____ [33 L.Ed.2d at pp. 498–499].)

Morrissey also specifies certain procedural rights which must be allowed the parolee in connection with each hearing. Common to both hearings are his right to advance notice of the claimed violations of parole, and his entitlement to be heard in person and to present witnesses and documentary evidence. He has a limited right of confrontation. (408 U.S. at pp. ____ [33 L.Ed.2d at pp. 497–499].)

FACTS

In the case at bench, the controlling facts alleged in the petition, return, and traverse are undisputed.

Petitioner was paroled to San Bernardino County on May 8, 1972. On July 28 his parole was suspended and he was ordered returned to prison "pending further determination" of parole violation charges. He was arrested as a parole violator on July 31 in Bishop, Inyo County. On September 13, he was released from the custody of the Inyo County sheriff to the custody of the sheriff of San Bernardino County.

On September 26, 1972, a written specification of charges was addressed to the Adult Authority by petitioner's parole supervisors. The charges specified were (1) that petitioner violated "condition 1" of his parole by leaving the San Bernardino County area the previous July without notifying his parole agent; (2) that petitioner violated "condition 2" of his parole by operating a vehicle while intoxicated near Chino on July 8, 1972, in violation of Vehicle Code section 23102, subdivision (a), "as evidenced by his conviction in San Bernardino Municipal Court," where he was sentenced on September 14; and (3) that in July 1972 he violated "condition 4" of his parole by writing a check without sufficient funds and by failing to comply with an agreement with the payee in Pomona to deposit funds to cover the check.[1]

As a sequence of the drunk driving conviction (entered on petitioner's plea of guilty), he was jailed in San Bernardino County on September 14 as a condition of probation, the jail term expiring October 13. On October 20 parole was again ordered suspended and petitioner was ordered returned to prison "for revocation proceedings."

On October 24, while still incarcerated at the San Bernardino County jail (even though his term for drunk driving had expired), petitioner was given a "copy of the alleged Parole Violation charges"[2] and

[1] The nature of the cited parole conditions has not been specified to us either by petitioner or by the Attorney General, but may be inferred from the undisputed facts alleged.

[2] We quote the petition. Since it also alleges that "the San Bernardino County Jail . . . [is] an area reasonably close to the locality where the alleged Violation occurred," we infer that the "copy of the alleged Parole Violation charges" which petitioner received on October 24 was a copy of the written specification of charges prepared by his parole supervisors on September 26. (See fn. 3, infra.)

a "Notice of Rights to Pre-Revocation Hearing." The latter notice informed petitioner that he was entitled to a "Pre-Revocation [i.e., preliminary] hearing within ten (10) days," where he could testify concerning the parole violation charges, present documentary evidence and witnesses, and interrogate adverse informants. That same day (October 24), in the presence of a parole officer, petitioner made a written request for a pre-revocation hearing. On November 2, however, without the requested hearing, petitioner was removed from jail and was taken to the Reception Guidance Center at Chino; he was transferred six days later to the California Conservation Center at Susanville ("approximately 600 miles from the alleged violation").

On November 20, 1972, according to the return, "[p]etitioner received a copy of the charges against him as to the violation of parole conditions. . . ."[3]

[3] The notice referred to in the return is attached as an exhibit to it. The notice, dated November 15, 1972, does not comport with due process. It states that a hearing on the charges will be held at a date and place "to be determined. . . ." In describing the charges, it merely alleges that petitioner "did violate Condition 1 of his Parole agreement . . . did violate Condition 2 of his Parole agreement . . . did violate Condition 4 of his Parole agreement."

It seems fundamental that the notice required by Morrissey v. Brewer, supra, 408 U.S. 471 [33 L.Ed.2d 484], must be notice adequate to enable the parolee to plead to the charges of parole violation, to prepare any defense he may have, and to assert the Adult Authority's prior determination of the charges if they are ever brought again. Accordingly, whether in the context of the *Morrissey* preliminary hearing or later revocation hearing, the parolee must be given "timely formal notice of (1) the conditions which he is accused of violating, (2) the *manner* in which he is accused of violating such conditions, and (3) the *date* and *place* of the proposed hearing" (Riggins v. Rhay (1969) 75 Wash.2d 271, 286 [450 P.2d 806, 815]) (emphasis added). (Cf., People v. Jordan (1971) 19 Cal.App.3d 362, 368; In re McDonald (1920) 45 Cal.App. 480, 486.)

On December 20, shortly after we issued an order to show cause, petitioner was transferred to the California Institution for Men, Chino. The return further shows that an "in-prison parole revocation" hearing for petitioner was "scheduled to be held" at the Chino facility on or before February 9, 1973 (prior to oral argument herein). No preliminary hearing on the parole violation charges has ever been held.

CONTENTIONS

Morrissey v. Brewer, supra, 408 U.S. 471 [33 L.Ed.2d 484], was decided June 29, 1972, one month prior to the suspension of petitioner's parole. His due process rights are therefore governed by *Morrissey*. (See, People v. Vickers (1972) 8 Cal.3d 451, 462.)

In response to petitioner's complaint that he has never had a *Morrissey* preliminary (i.e., pre-revocation) hearing, the Attorney General contends that "In this case since one of the charged violations is the conviction of a new crime [i.e., drunk driving], no hearing to determine probable cause is necessary . . . . There is no danger in such a case that the parolee's liberty is being affected without probable cause." The Attorney General claims support in *Morrissey's* statement that "Obviously a parolee cannot relitigate issues determined against him in other forums, as in the situation presented when the revocation is based on conviction of another crime" (408 U.S. at p. ____ [33 L.Ed.2d at p. 499]).

The Attorney General's contention cannot be sustained. It attempts to carve out—from the dictum [4] of *Morrissey*—an exception to *Morrissey* which the

[4] *Morrissey* did not involve parole violations amounting to conviction of a new crime. (See, 408 U.S. at pp. ____ [33 L.Ed.2d at pp. 489-490].)

United States Supreme Court did not. *Morrissey* included the preliminary hearing on the parole violation charges among the "basic requirements" of due process; the high court did not exclude such requirement "in the situation presented when the revocation is based on conviction of another crime." The court merely excluded the parolee's relitigation of "issues determined against him" in the criminal prosecution leading to such conviction. (408 U.S. at p. ____ [33 L.Ed.2d at p. 499].) Such previously resolved issues, if any, must obviously *be identified.*

The basic flaw in the Attorney General's argument is that it postulates, as a general proposition, the accuracy of the specification of parole violation charges drafted by parole supervisors. *Morrissey*, on the other hand, emphasizes that not only the parolee but society as well "has an interest in not having parole revoked because of erroneous information . . . ." (408 U.S. at p. ____ [33 L.Ed.2d at p. 496].) When a purported new conviction is alleged in a charge of parole violation (even where documented by an abstract of judgment), compliance with *Morrissey* requires, in our view, that an opportunity be available to the parolee to show that he was not the person convicted (cf., People v. Willison (1931) 116 Cal.App. 157, 159–160), that the offense of which he was convicted was other than the one specified as a parole violation (cf., People v. Morton (1953) 41 Cal.2d 536, 540–541), or that the charge alleging the conviction—except as to matters in fact determined in the criminal prosecution—is in other respects inaccurate (see, Mays v. Nelson (9th Cir. 1972) 464 F.2d 585).[5] Such opportunity should

[5] The Attorney General quotes In re Cleaver (1968) 266 Cal.App. 2d 143, at page 158, for the proposition that "To allow inquiry into the merits of a charge of parole violation pending

be made available to the parolee at a *Morrissey* preliminary hearing, for, as *Morrissey* points out, "[t]here is typically a substantial time lag between the arrest and the eventual determination by the parole board whether parole should be revoked" (408 U.S. at p. ____ [33 L.Ed.2d at p. 496]), and the parolee's ability to refute the charge of a new conviction may hinge upon whether "information is fresh and sources are available" (*ibid.*).

Moreover, in requiring a preliminary hearing, *Morrissey* specifies that "the determination that reasonable grounds exist for revocation of parole should be made by someone not directly involved in the case"; and *Morrissey* declares that the "parole officer . . . who has made the report of parole violations or has recommended revocation" is ineligible to make the determination of probable cause. (408 U.S. at p. ____ [33 L.Ed.2d at p. 497].) In the present case, where the new conviction has been alleged in charges made by petitioner's parole supervisors, acceptance of the Attorney General's argument would, in effect, leave the decision as to probable cause with the very parole officers whom *Morrissey* has disqualified.

We note also the requirement of *Morrissey* that the preliminary hearing officer make "a summary, or digest, of what transpires at the hearing in terms of the responses of the parolee and the substance of the documents or evidence given in support of parole revocation and of the parolee's position." (408 U.S. at p. ____ [33 L.Ed2d at p. 498].) *Morrissey* further

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the hearing of a criminal case on which it is based would produce a chaotic sitation." Unlike Cleaver, however, the parole violation charge in the instant case alleges a prosecution which has terminated in conviction rather than one still pending in the trial court.

declares that the *second* stage of parole revocation—the revocation hearing itself—"should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial." (408 U.S. at p. ---- [33 L.Ed.2d at p. 499].)

The high court's latter statement is broad enough to permit the introduction, at the revocation hearing, of the preliminary hearing officer's summary or digest of the evidence. *In addition to the parole violation charge alleging the drunk driving conviction, petitioner was charged by his parole supervisors with having violated two other parole conditions.* Regardless of the allegation of a new conviction of crime, petitioner was entitled to a preliminary hearing on the other charges "reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available" (408 U.S. at p. ---- [33 L.Ed. 2d at p. 496]). Denial of a preliminary hearing on even one of several parole violation charges, and the resultant lack of any summary or digest thereon by the hearing officer, could prove extremely prejudicial to a parolee at the revocation hearing when relevant information might no longer be fresh or available.

DISPOSITION

A more difficult question concerns the result which should follow from the denial to petitioner of a *Morrissey* preliminary hearing. The issue appears to be without any reported appellate precedent in the United States, undoubtedly because *Morrissey* is so recent.

Until oral argument herein on February 22, 1973, we had nothing before us to show whether petitioner's

scheduled revocation hearing had been held, and if so, what transpired at such hearing. At the oral argument, the Attorney General filed an evaluation and dispositional report of the Adult Authority (presenting us with a seeming *fait accompli*) which indicates that an in-prison revocation hearing was held at Chino on February 9; that petitioner pled not guilty to all three parole violation charges; that he was found "guilty as charged" *on all counts;* and that his parole was thereupon formally revoked.

Morrissey indicates that no preliminary hearing is required where parole is revoked on the basis of parole violation charges admitted by the parolee to the parole board. (408 U.S. at pp. ____, ____ [33 L.Ed.2d at pp. 492, 499]; see also, People v. Vickers, supra, 8 Cal.3d at p. 457, fn. 6.) However, revocation which is based even in part on charges unadmitted to the board would not satisfy the latter exception. Moreover, in *Morrissey* the revocation hearing for each parolee there involved was apparently held within two months after his arrest for parole violation, a lapse of time which the Supreme Court stated would meet its requirement that "[t]he revocation hearing must be tendered within a reasonable time after the parolee is taken into custody." (408 U.S. at pp. ____, ____ [33 L.Ed.2d at pp. 489–491, 498].) In contrast, according to the exhibits attached to the return, petitioner was available to the Adult Authority on October 13, 1972, upon completion of his jail term for drunk driving, but he was not removed from jail and returned to the prison system until November 2. No reason is offered by the Attorney General why petitioner's revocation hearing was scheduled for a time almost four months removed from the date the jail term ended.

It is unnecessary for us to determine whether petitioner must show prejudice from the delay in his revocation hearing before he can obtain judicial relief (see generally (pre-*Morrissey*), Shelton v. United States Board of Parole (1967) 388 F.2d 567 [128 U.S. App.D.C. 311]; Jenkins v. United States (D.Conn. 1972) 337 F.Supp. 1368; United States v. Kenton (D. Conn. 1967) 262 F.Supp. 205), for it is undisputed that he has had no *preliminary* hearing whatever on the charges of parole violation. Absent any showing that petitioner has admitted the charges to the parole board, the denial of a preliminary hearing has deprived him of due process and renders his imprisonment as a parole violator illegal. Whether he has been prejudiced from such denial is irrelevant.[6]

"Denial of fundamental constitutional rights is not excused by want of prejudice." (People v. Linden (1959) 52 Cal.2d 1, 33.) *Morrissey's* requirement of a preliminary hearing would be meaningless if the Adult Authority could cure the lack of a preliminary hearing by the mere holding of a revocation hearing, even one which complied with *Morrissey*. The *Morrissey* case requires *both* hearings. The omission of a preliminary hearing on charges of parole violation is analogous to the absence of a preliminary examination on criminal charges prosecuted thereafter by infor-

[6] For example, petitioner's traverse admits that on September 14, 1972, in the San Bernardino Municipal Court, he pled guilty to drunk driving; but the traverse also alleges that "due to the unreasonable delay of the Adult Authority in granting a hearing two key witnesses are unavailable." (One of the witnesses died prior to filing of the instant petition.) The foregoing matters are sworn to in the traverse by petitioner's appointed counsel, who represents that he has personal knowledge of them. Elsewhere in the traverse, *unverified* allegations are made that the "two key witnesses" had information relevant to petitioner's defense to the two parole violation charges which did not involve the drunk driving conviction.

mation. If the latter examination has not been waived, prejudice is presumed from the lack of one, and the defect is jurisdictional. (People v. Elliot (1960) 54 Cal.2d 498, 503–507; People v. Brooks (1946) 72 Cal. App.2d 657, 661.)

It is obviously too late to afford petitioner a prompt preliminary hearing, as *Morrissey* requires (408 U.S. at p. ---- [33 L.Ed.2d at p. 496]). However, our disposition of this matter is not governed by the impossibility of now giving petitioner a preliminary hearing reasonably close in time to his original detention as an alleged parole violator. What is of more significance, in our view, is the fact that there is no procedure for releasing petitioner on bail pending any preliminary hearing which we might order. (See, Aguilera v. California Dept. of Corrections (1966) 247 Cal.App.2d 150, 153.) The situation is thus distinguishable from that which prevails in the ordinary criminal case upon reversal for constitutional error.

An orthodox disposition of this case—i.e., an order directing a preliminary hearing but not affecting petitioner's custody—would leave him illegally incarcerated in the interim and would offer little inducement for the holding of such hearings without judicial intervention. A revocation hearing now having been held which has resulted in petitioner's parole being revoked by the Adult Authority, a preliminary hearing at this point (with or without interim release) would require superhuman objectivity by the preliminary hearing officer, who can be "someone such as a parole officer other than the one who has made the report of parole violations or has recommended revocation" (Morrissey v. Brewer, supra, 408 U.S. at p. ---- [33 L.Ed.2d at p. 497]).

Under these circumstances, we hold that the failure of the Adult Authority to conduct the preliminary hearing required by *Morrissey* constituted a waiver of the alleged parole violations, and that petitioner is entitled to be released from prison and restored to parole upon the same conditions of parole as they existed prior to the alleged violations. (See, Stewart v. Parole Board (1969) 382 Mich. 474, 479 [170 N.W. 2d 16, 18]; People v. Lynch (County Sup. Ct. 1972) 71 Misc.2d 921 [337 N.Y.S.2d 556].)

The writ is granted. Petitioner is ordered released from prison and restored to parole upon the same conditions of parole which existed prior to July 1972. (CERTIFIED FOR PUBLICATION.)

JANES, J.

We concur:

RICHARDSON, P. J.

FRIEDMAN, J.

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